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Clerk

# Supreme Court of the United States,

**OCTOBER TERM, 1903.**

**No. 93.**

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**The Postal Telegraph-Cable Company, Plaintiff**

**IN ERROR,**

***vs.***

**The Borough of Taylor.**

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**Paper Book of Defendant in Error.**

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**E. O. WAGENHORST and JOHN M. HARRIS,**
**Attorney for Defendant in Error.**

*IN THE*

# *Supreme Court of the United States.*

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*No. 93.*

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THE POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff IN ERROR,

*vs.*

THE BOROUGH OF TAYLOR.

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## BRIEF OF DEFENDANT IN ERROR.

Error in this case, on the part of the Supreme Court of Pennsylvania, is suggested by the appellant herein on two grounds.

*First.*—The decision of the Supreme Court of Pennsylvania offends Article 1, Section 8, clauses 3 and 7 of the Constitution of the United States.

*Second.*—The decision of the Supreme Court of Pennsylvania offends Article 16, Section 12 of the Constitution of the State of Pennsylvania, and, in connection therewith, the Act of April 29th, 1874, Section 33, P. L. 92, passed by the Legislature of Pennsylvania.

Upon the *first* ground the Appellant to this tribunal seeks a reversal, urging that by the enforcement of the decree of the Supreme Court of Pennsylvania, (1) Inter-

state Commerce will be interfered with beyond the power of the State of Pennsylvania so to interfere. (2) The Post Roads Act of the Congress of the United States of America of July 24, 1866, its supplements and amendments, will be infringed.

Upon the *second* ground the Appellant contends for reversal for the reason that Telegraph Companies in Pennsylvania are, by virtue of the Constitution of the State and the Act of 1874 passed by the State Legislature, exempt from the provisions of a Borough ordinance regulating the inspection of telegraph poles and wires by borough officials and the imposition by the Borough of license fees upon the same.

In the State of Pennsylvania the matter brought here for final adjudication is res adjudicata. A long line of decisions, covering a period of more than ten years, and rendered by distinguished jurists, with not a single wavering, from the lowest to the highest appellate court, to disturb the fixity of the proposition, establishes the law that a Borough in Pennsylvania may, by ordinance, impose upon Telegraph Companies a reasonable license fee for the poles and wires maintained by them in the limits of the borough, and that such an imposition is a legitimate exercise of the police power of the State delegated to Boroughs.

"The introduction and construction of telegraph, telephone, electric light, electric power and street car lines" says Willard, Judge, "through, over and upon city streets the erection of poles and stringing of wires thereon, charged with dangerous agencies as motive power, call for the exercise of more than ordinary care, not only in the erection of poles and proper adjustment of the wires, but in the maintenance and repair of the same and a vigilant and constant inspection, and every municipality owes the duty of rigid inspection to its citizens. In the performance of this duty the proper authorities of the city of McKeesport had a right to pass the ordinance above quoted, and

neglect on their part to have done so would have been neglect of public duty."

McKeesport vs. Railway Co. 2 Superior Court Rep. 242.

Millerstown vs. Bell, 123 Pa. 151.

Frankford Railway Company vs. Phila. 58 Pa. 119.

Taylor Borough vs. Postal Telegraph-Cable Company 16 Pa. Superior Court 345.

Johnson et al vs. Phila. 60 Pa. 445.

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As to the reasonableness of the fee fixed by the ordinance in this case, to wit: One dollar per pole and two dollars and fifty cents per mile of wire per annum: the Courts of Pennsylvania, from the Common Pleas to the Supreme Court, have declared these fees to be a reasonable charge in consideration of all the elements which enter into the charge. These elements may be enumerated as follows, to wit: The probable expense for issuing a license; the probable expense for such inspection, regulation and police supervision as the municipal authorities may deem necessary to make in the rightful discharge of their duties in the premises. Another important element, arises from the probable liability of the municipality for injuries to persons and property, resulting from defective poles and wires.

It was averred in the affidavit of the defendant in the case of the Borough of Taylor against the Postal Telegraph-Cable Company, tried in the Court of Common Pleas of Lackawanna County, that the license fees charged were at least five times the amount of the expense involved in the supervision exercised by the Borough. The Supreme Court of Pennsylvania however in the case of Chester City vs. W. U. Telegraph Co., 154 Pa. 466, holds:

"For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is, it does not go far enough. It refers only to the usual, ordi-

nary or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

The case now appealed was not tried before a jury; judgment having been entered against the plaintiff in error, in the Court of Common Pleas of Lackawanna County, Pennsylvania, without the interposition of a jury, but for want of a sufficient affidavit of defense. The case of the Atlantic & Pacific Telegraph Company against Philadelphia, which was tried before a jury, and where it was held that "the question of reasonableness (of the license fee) should be submitted to the jury," does not therefore apply. 190 U. S. 160.

## INTERSTATE COMMERCE.

The ordinance passed by the Borough of Taylor, the appellee herein, is not directed against interstate commerce. The provisions of the ordinance apply to domestic as well as foreign, to local and out-side owners and lessees of Telegraph lines. Under the regulations, police charges are imposed not upon the value or volume of business transacted in the Borough, nor upon the right to transact such a business there, nor for the privilege of engaging in interstate commerce. The ordinance is an ordinary police regulation designed to protect life and property; and imposing license fees upon the poles and wires of the

Appellant situated in the Borough, for the purpose of defraying in some manner the expense of inspecting the same, and not upon the Appellant's business, it is not a regulation of interstate commerce. A constant and well regulated inspection by borough officials of telegraph poles and wires is advantageous to the government and the general public.

The provisions of the ordinance do not obstruct commerce; they aid it.

Adams Express Company vs. Ohio, 165, U. S. 194.

Adams Express Company vs. Ohio, (refusing a new hearing) 166 U. S. 185.

Hennington vs. Georgia, 163 U. S. 299.

Pullman Palace Car Company vs. Commonwealth of Pennsylvania, 141 U. S. 613.

The ordinance of the Borough of Taylor is internal police legislation, neither prohibitive of, or restrictive upon, or directed against any particular commerce of the class over which it legislates.

The power to enact laws regulating the internal commerce of a State, and those which respect turn-pike roads, has never been surrendered to the general government.

Gibbons vs. Ogden, 9 Wheaton 203, 204, etc.

A license tax is not a regulation of commerce.

License Tax Cases, 5 Wallace 462.

Osborne vs. Mobile, 16 Wallace 479.

License Cases 5 How. 504.

The ordinance imposes upon the borough officials duties and obligations; a circumstance which frees the regulation from the imputation that it is a revenue measure.

It is the duty of every municipality to its citizens to inspect with greatest scrutiny the erection and maintenance of poles and wires upon the streets, and the burden of such scrutiny should be borne by those whose interest in the erection and maintenance of the poles and wires are the

greater. At any rate the police power of the state is paramount, and a license fee for police inspection is not a regulation of commerce.

It is not of record in this case that the Appellant Company, by reason of the enforcement of the provisions of the ordinance, was unduly hampered in transmitting interstate messages, nor does it appear that its commerce was destroyed. The Appellant Company does not deny, it is a fact admitted, that at many points within a radius of ten miles of Taylor Borough, it both receives and transmits messages to and from States.

A borough in Pennsylvania, in the exercise of its police power, has the right and power to require of the Appellant Company the erection of safe poles and wires, and it has the right to constantly inspect the poles and wires and to see that they are safe. It is more than a right, it is a duty of the Borough officials to protect the lives and property of the citizens. The collection of revenue is not the object of the ordinance. It is, therefore, a proper police regulation, under the ruling in New York, New Haven et al Railway Company, vs. New York, 165 U. S. 628.

## POST ROADS ACT.

A telegraph company may not, relying on this act, occupy the streets of a municipality without compensation to the municipality.

St. Louis vs. W. U. Telegraph Company, 148 U. S. 92.

The license fees imposed upon the Appellant Company by the Borough of Taylor are not sufficiently large to deprive the said Appellant Company of power to serve the government as it was intended to serve it, nor does it hinder the efficient exercise of its power. There is nothing in the record in this case to show it, and it is contended here by the Appellee that, in this case, the Court below was the proper and the only Judge of what amounts to such

excessive and exhorbitant charges as to cripple the Appellant Company; the Court below being cognizant of the facts and circumstances in this case, and in similar cases as they may vary in various municipalities within its jurisdiction.

Telegraph Companies enjoying the privileges of the Act of July 24th, 1866, do so in subordination to the due exercise of the police power of the State in which their lines are situated.

Richmond vs. Bell Telephone & Telegraph Company, 174 U. S. 761.

The rights so given are permissive only, and properly subject to all state and local legislation regulating their exercise.

## THE CONSTITUTION OF PENNSYLVANIA AND THE ACT OF 1874.

It is true that, under the constitution and laws of Pennsylvania, associations, corporations and individuals have the right to construct and maintain lines of telegraph within the State, but Art. XVI, Section 3, of the Constitution of Pennsylvania says, "The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State."

The Appellant Company owes an obedience to the laws of Pennsylvania, from yielding which an act of Congress cannot dispense it. The police power of the State is supreme over Congress. It existed in municipal corporations at common law. By the exercise of this police power, the legislature of Pennsylvania by an Act of Assembly, and the borough of Taylor by ordinance, protects the citizens of the borough against what may be declared negligence in the management and maintenance of the Appellant's poles and wires. It is subject to reasonable restraints and

burdens. "There is no arbiter in such case, beyond the State itself, to determine what legislation is just."

Potters Dwaris on Statutes and Constitutions. (Ed. 1871) P. 445-456.

The fourteenth amendment to the Federal Constitution did not take from the states the police power reserved to them at the time of the adoption of the Constitution.

Slaughter-house cases, 16 Wallace 36.

Mugler vs. Kansas 123 U. S. 623.

Cooley (Constitutional Limitations) P. 239.

The ordinance is not inharmonious, or hostile to citizens or corporations of New York State employed in business in the borough of Taylor, inasmuch as it imposes on citizens and corporations of Pennsylvania and of the borough itself the self-same conditions. The ordinance is uniform and operates alike on all, and is, therefore, a proper State regulation.

Western Union Telegraph Co. vs. Mass. 125 U. S. 530.

Leloup vs. Port Mobile, 127 U. S. 311.

## CONCLUSION.

Every phase of the matter here presented has been passed upon and finally adjudicated in this Court, in the case of

St. Louis vs. W. U. Telegraph Co., 148 U. S. 92.

Reaffirmed in St. Louis W. U. Telegraph Co., 156 U. S. 211.

Reaffirmed in Western Union Telegraph Company vs. New Hope, 187 U. S. 419; and followed in Atlantic & Pacific Telegraph Company vs. Philadelphia, 190 U. S. 160.

It is therefore respectfully requested that the judgment of the Pennsylvania Courts be affirmed, and that the judgment of the Supreme Court of the United States be entered for the defendant in error herein.

E. O. WAGENHORST and JOHN M. HARRIS,

*For Defendant in Error.*